

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 4th February, 2019*

+ FAO(OS) 27/2019, CM Nos. 5217/2019, 5218/2019 &
5219/2019

M/S SATYA PARKASH & BROS (P) LTD Appellant
Through: Mr. Aseem Mehrotra, Adv.

versus

GOVERNMENT OF NCT OF DELHI & ANR Respondent
Through: Mr. Sanjay Dewan, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM Nos. 5217/2019 & 5218/2019 (for exemption)

Exemption allowed, subject to all just exceptions.

Applications stand disposed of.

CM No. 5219/2019 (for delay)

This is an application filed by the appellant seeking condonation
of 30 days delay in filing the present appeal.

For the reasons stated in the application, the delay of 30 days in
filing the present appeal is condoned. Application stands disposed of.

FAO(OS) 27/2019

1. The challenge in this appeal is to the order dated November 14, 2018 passed by the learned Single Judge in O.M.P. 27/2012 filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'Act of 1996').

2. Some of the facts as noted from the appeal are that a Contract was awarded to the appellant for improvement of "*Nelson Mandela Marg, (Road No.17), New Delhi SH: Development / Widening of road from 4 lanes to 8 lanes including construction of drains, footpath and extension of culverts etc. (RD-0 to RD 4040)*". The estimated cost of work was Rs. 10,30,90,036/-. A formal letter of awarding the contract was issued to the appellant on May 10, 2002. The starting date of the contract was May 17, 2002 and the date of completion was May 16, 2003.

3. It is a conceded position that the contract was foreclosed on October 26, 2014; the actual date of completion was taken to be November 26, 2004. Various disputes arose between the parties. An Arbitrator was appointed by this Court. The appellant had raised eight claims which were as under:

- *Claim No.1 - Claim towards the final bill*
- *Claim No.2 - Claim of execution of increased/additional quantity of work*
- *Claim No.3 - Claim of escalation of Rs.72,58,640/- due to various hindrances resulted for almost delay of 15 months.*
- *Claim No.4 - Claim due to delay of machinery, deployment including the extra expenses.*
- *Claim No.5 - Claim due to delay (extra manpower which was deployed)*
- *Claim No.6 - Prolongation of contract, loss/profit in view thereof.*
- *Claim No.7 - Pendente lite and future interest.*
- *Claim No.8 - Litigation cost and expenses.”*

4. During the pendency of the arbitration proceedings, an amount of Rs. 17,32,156/- was paid to the appellant. Hence, the claim insofar as the final bill was concerned, was satisfied. The learned Arbitrator has awarded 9% interest on the said amount for the period from June 01, 2007 to March 30, 2011. The challenge before the learned Single Judge was rejection of claim No.3, which was a claim for escalation for an amount of Rs.72,58,640/-.

5. The plea taken by Mr. Aseem Mehrotra, learned counsel appearing for the appellant before the learned Single Judge was that the hindrance register being an admitted document between the parties clearly records various hindrances that were caused due to which delays had taken place in the execution of the contract. The delay being attributed to the respondents herein, the appellant is entitled to escalation. The learned Single Judge has in paras 14 to 16 held as under:

“14. As recorded above, it was the common case of the parties that clause 10CC was not applicable. However, the learned Arbitrator, based on the settled position of law as cited by the Contractor holds that since there has been delay which is solely attributable to the Government, the Contractor can still claim escalation. The learned Arbitrator has not committed any error in law. However, learned Arbitrator thereafter records that while the hindrance register records certain hindrances, which were admittedly caused during the execution of the contract, for example on 1st October, 2002, 15th May, 2003, 20th February, 2004 and 14th March, 2003, various electric cables/poles, high tension pillars, huts, acquiring of land from DDA, shifting of pipes and man holes, shifting of DTC bus

stand, removal of trees, shifting of MTNL Boxes and Cables etc. However, evidence on record did not show that the execution of contract was stopped in any manner. It is a factual finding of the learned Arbitrator that hindrances recorded in the hindrance register did not result in stoppage of work. Learned Arbitrator, in fact, relied upon the various letters written by the Government, which show that the Contractor itself had not deployed sufficient labour and machinery on the site. Learned Arbitrator further notes that the Contractor sought repeated extensions for completion of work and at the time when extensions were granted, same were to be granted without claim of any compensation.

15. The Arbitrator relied on letter dated 3rd March, 2006 written by the Contractor, which reads as under:

“In continuation to our letter under reference and as per your verbal instructions we hereby undertake that we have not suffered any financial loss on account of delay in completion. and will not claim anything extra on this.”

16. As per this letter, it is clear that the Contractor had agreed to not claim any compensation or financial losses or raise any claims for any extra

amounts in this regard. The Contractor having agreed to not raise any claim, the claims in respect of delays are rightly rejected by the learned Arbitrator. In fact, a perusal of the calculation sheet, in which the Contractor raised the claim for escalation shows, that the same has been raised on the basis of clause 10CC, which is clearly not applicable. The learned Arbitrator based on the three counts i.e. 1) Factual analysis of stoppage of work and deployment of machinery; 2) In view of undertaking dated 3rd March, 2006 and 3) On the basis of non-applicability of section 10CC, rejected the claims in respect of delays, which have been raised by the Contractor.”

6. Mr. Aseem Mehrotra has reiterated the submission made by him before the learned Single Judge, even before us. He has drawn our attention to page 94 of the record to contend the hindrances that had taken place in the execution of the contract. It is his submission that there is enough evidence filed by the appellant to contend that there was escalation of price. Unfortunately, said aspect has not been considered / dealt with by the learned Arbitrator in the award. In other words, it is his case that the appellant was entitled to escalation. He states that a similar error has been made by the

learned Single Judge while considering objections under Section 34 of the Act of 1996.

7. We are not impressed by the submission made by Mr. Aseem Mehrotra in view of the reasons given by the learned Single Judge which we have noted above and also in view of the letter dated November 16, 2004 written to the appellant by the respondents approving the extension of time for completion of the work. The said letter reads as under:

“No. 18/EE/DS&CM/496 Dated: 16/11/04

To,

*M/s Satya Prakash & Bros. Pvt. Ltd.,
Govt. Contractors & Engineers,
A-1, C.C. Colony, Opp. Rana Pratap Bagh,
Delhi – 110007*

*Sub: Improvement of Nelson Mandela Marg (Road
No.1), New Delhi.*

*(SH: Development / Widening of Road from 4 lanes to 8
lanes including construction of drains / footpath and
extension of Culvert etc. (RD 0 to RD 4040) – regarding
Provisional Extension of Time.*

(Agreement NO. 01 /EE/FD-1/202-03).

Dear Sir,

The date of completion of the above mentioned work is 16/5/2003 as stipulated in the agreement dated the 10/5/2002. Provisional Extension of time for completion of the above mentioned work is granted upto 30/11/2004 without prejudice to the right of the Government to recover liquidated damages in accordance with the provision of Clause -2 of the said agreement dated the 10/5/2002.

Provided that notwithstanding the extension thereby granted, time is and shall continue to be the essence of the said agreement.

*Yours faithfully
For and on behalf of
President of India*

*Sd/-
(B.K. SINHA)
Executive Engineer,
DS&CM Project,
PWD, New Delhi.”*

8. Suffice it to state that the extension of time was given at the asking of the appellant, wherein it was clearly stated that the extension is being granted by the Government without prejudice to

its right to recover liquidated damages in accordance with clause 2 of the agreement. It is not the case of the appellant that it had objected to the contents of the letter and had also sought escalation. In fact, Mr. Aseem Mehrotra has conceded that the appellant had accepted the extension of completion of the work on the terms stated therein as the appellant was apprehensive that coercive action shall be taken against it by the respondents.

9. If that be so, the appellant having accepted the terms on which the extension of completion of work was granted and also the fact that the appellant himself as noted by the learned Single Judge has stated that he has not suffered any financial losses on account of delay in completion of the work, the impugned order needs no interference, moreso when we are exercising jurisdiction under Section 37 of the Act of 1996. The appeal is dismissed. No costs.

V. KAMESWAR RAO, J

CHIEF JUSTICE

FEBRUARY 04, 2019/aky